

STATE'S MOTION TO ADMIT OTHER ACTS UNDER RULE 404(b) AND/OR (c), ARIZ. R. EVIDENCE

In child sexual abuse case, the State can present evidence of defendant's other uncharged acts of removing the victim's pants to show intent, "lewd disposition" toward the victim, and propensity to commit sexually aberrant acts.

The State of Arizona, by and through undersigned counsel, hereby moves, pursuant to Rule 404(b) and/or (c) of the Arizona Rules of Evidence and *State v. Hyde*, 186 Ariz. 252, 276, 921 P.2d 655, 679 (1996); *State v. Jerousek*, 121 Ariz. 420, 426-27, 590 P.2d 420, 1372-73 (1979); *State v. Garner*, 116 Ariz. 443, 569 P.2d 1341 (1977); and *State v. Rojas*, 177 Ariz. 454, 459-60, 868 P.2d 1037, 1042-43 (App. 1993), to admit other uncharged acts committed by the defendant upon the victim.

The State intends to admit evidence of other uncharged acts as described by the victim in the police reports. Specifically, the State intends to admit evidence of the defendant's act of unbuttoning the victim's pants and pulling them down approximately two to four weeks prior to the charged crimes.

The State contends that this other act demonstrates the defendant's intent and/or "lewd disposition" toward the victim. Testimony regarding this act is admissible pursuant to the above-cited authority.

It should also be noted that, to be admissible, the other act need not be a crime, but, if it is a crime, it is irrelevant whether or not the State charged the defendant with it. See, e.g., *State v. Castaneda*, 150 Ariz. 382, 390-91, 724 P.2d 1, 9-10 (1986) and *State v. Fierro*, 166 Ariz. 539, 547, 804 P.2d 72, 80 (1990).

Rule 404(c) of the Arizona Rules of Evidence allows evidence of aberrant sexual propensity of the defendant to be admitted into evidence if the evidence is relevant. It provides as follows:

(c) Character evidence in sexual misconduct cases:

In a criminal case in which a defendant is charged with having committed a sexual offense, . . . , evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

- (i) remoteness of the other act;
- (ii) similarity or dissimilarity of the other act;
- (iii) the strength of the evidence that defendant committed the other act;
- (iv) frequency of the other acts;
- (v) surrounding circumstances;
- (vi) relevant intervening events;
- (vii) other similarities or differences;
- (viii) other relevant factors.

(D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule

401(c)(1).

In this case, the other act preceded the charged offenses by only a few weeks. The acts are similar because they involved the same victim and removal of the victim's clothing. The acts also indicate sexual aberrancy. An aberration has been defined as a deviation from the proper, normal, or typical course. *State v. Beck*, 151 Ariz. 130, 134, 726 P.2d 227, 231 (App. 1986). Specific acts defined by courts as sexually aberrant include sodomy, child molestation, and lewd and lascivious conduct. *State v. McFarlin*, 110 Ariz. 225, 228, 417 P.2d 87, 90 (1973). In this case, the defendant's acts of removing the victim's clothing to expose the victim's genitalia is a deviation from the proper, normal, or typical course. And no expert testimony is needed to establish that "there is a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged." Rule 404(c)(1)(B), Ariz. R. Evid.¹ Expert testimony is not needed because the acts occurred within a short time period, were similar to the charged offenses, and are

¹ The Comment to Rule 404(c) specifically states:

Subsection (1)(B) of Rule 404(c) is intended to modify the *Treadaway* rule by permitting the court to admit evidence of remote or dissimilar other acts providing there is a "reasonable" basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged. The *Treadaway* requirement that there be expert testimony in all cases of remote or dissimilar acts is hereby eliminated.

sexually aberrant acts.

Therefore, the State respectfully asks this Court to grant its Motion and rule that evidence of the defendant's other acts is admissible at trial.